United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 76-4228

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

W. J. USERY, JR., SECRETARY OF LABOR,

Petitioner,

v.

NORTHEAST MARINE TERMINAL COMPANY
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

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I N D E X

Citations

Cases

Statutes and Regulations

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4228

RAY MARSHALL, SECRETARY OF LABOR */

Petitioner,

v.

NORTHEAST MARINE TERMINAL COMPANY

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Respondents.

ON PETITION TO REVIEW AN ORDER
OF THE OCCUPATIONAL SAFETY
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COMMISSION

BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF ISSUE PRESENTED

1. Whether the Commission erred as a matter of law in failing to find Northeast Marine Terminal Company in violation of Section 5(a)(2) of the Occupational Safety and Health Act for failure to comply with 29 CFR sections 1910.22(a)(1), 1910.106(e)(2)(iv)(b) and 1910.178(m)(3).

*/ Pursuant to Rule 43(c), Fed. R. App. P., Ray Marshall, who succeeded W.J. Usery, Jr., as Secretary of Labor on January 27, 1977, is substituted as a party.

STATEMENT OF THE CASE

I. Nature of the case.

This case is before the Court pursuant to section 11(a) of the Occupational Safety and Health Act of 1970 (the Act) (84 Stat. 1590, 29 U.S.C. section 651 et seq) on the Secretary of Labor's petition to review an order of the Occupational Safety and Health Review Commission issued on August 31, 1976. The Commission's decision is unofficially reported at 4 BNA OSHC 1671, and at CCH ESHG ¶ 21,053, and is reproduced in the joint appendix (A. 156-165).[1/] This Court has jurisdiction under 29 U.S.C. section 660(b), the cited violation having occurred in Brooklyn, New York.

2. Pertinent facts.

The facts are either undisputed or established by the unrebutted testimony of the compliance officer. Northeast Marine Terminal Company is a co-lessee with Northeast Stevedoring Company of a marine terminal and storage facility located at the foot of 39th Street in Brooklyn, New York. (A. 158, 150, 35-36) The two companies are separate corporate entities but they occupy the same worksite (A. 35-36). On April 3 and 4, 1974, Compliance Officer Joseph D. Martino of the Occupational Safety and Health Administration conducted an inspection of the marine terminal facility occupied by these two companies (A. 42). The compliance officer had inspected this facility

1/ "A" references are to the joint appendix filed with petitioner's brief.

on previous occasions and believed that the site was occupied by a single company called Northeast Stevedoring. (A. 158, 74-75, 132-135). On this particular occasion, he met for an hour with Mr. Kiplock (A. 45), [2/] who had on one previous inspection represented himself to Mr. Martino as being the "Safety Director and the Coordinator for the complex" (A. 134-135); then the two of them, in the company of the shop steward of the union, toured the entire facility over a two day period (A. 42, 50-51). During the inspection, the compliance officer observed a number of hazardous conditions which violated various safety standards promulgated by the Secretary. In particular, he noticed three conditions which resulted in the citations which are the subject of the petition for review in this Court. First, Mr. Kiplock and the compliance officer observed a powered industrial truck, also referred to as a high-low vehicle, being driven out of a shed on the worksite with the driver occupying the only seat and a second person riding on the body of the vehicle (A. 56-59, 82, 158). One of the employees was identified as Mr. Lennon, a foreman of the pier, (A. 158, 58, 82) and both of them dismounted when told to do so by Mr. Kiplock and the compliance officer (A. 58, 71). Secondly the compliance officer observed a large accumulation of debris, tools, machines and other materials in the garage for the site and in the storeroom of the "111a" building all of

2/ Mr. Kiplock's name is incorrectly spelled throughout the transcript as "Chiplock."

which presented hazards of tripping and falling and which blocked the means of egress in the event of an emergency (A. 98-104). At the time of this observation Mr. Kiplock ordered that these areas be cleaned up and this was done (A. 99, 102). Lastly, the inspection in the garage disclosed that gasoline used to clean machine parts was stored in uncovered cans. Cleaning the machine parts took place in a caged area with limited means of escape in the event the gasoline exploded or caught fire (A. 128-29). The compliance officer and Mr. Kiplock discussed the possibility of using a type of cleaner with a high flash point (A. 129).

In the course of the inspection, the compliance officer was introduced to Mr. Magna, who told Mr. Martino that he was the Engineer for the Terminal Company, in charge of maintenance, and who supplied a business card to that effect (A. 49, 77-78). Kiplock and Magna corrected several hazardous conditions with respect to which the Secretary has not sought review. 3/

At the end of the two-day inspection, the compliance officer held the customary closing conference with the man with whom he had walked around the worksite, Mr. Kiplock (A. 53, 131). At this conference, the compliance officer learned from Mr. Kiplock that the worksite was occupied by two different corporations,

3/ For example, Mr. Kiplock agreed to prevent the use by maintenance personnel of ladders not maintained in a safe condition in violation of 29 CFR 1910.27(f) (A. 89-90, 93-94). He also said that he would remove from the garage shop a radial arm saw which did not have the blade guard required by 29 CFR 1910.213(h)(1) (A. 107-08, 111). Mr. Magna corrected a situation where the use and placement of another ladder allegedly violated 29 CFR 1918.25(e) and (f) (A. 119-23, 127-28).

Northeast Marine Terminal Company and Northeast Stevedoring Company, each with different functions and responsibilities. (A. 53, 132-33). Mr. Kiplock said that Northeast Stevedoring was responsible for loading and unloading cargo from ships and trucks, and Northeast Marine provided maintenance and repair services for the complex. (A. 53). Mr. Kiplock told the compliance officer that he represented both companies for the purpose of the inspection (A. 113), and he supplied the Federal reporting numbers for each corporation (A. 133). On the basis of what Kiplock said, the two of them determined which of the violative conditions fell into which company's sphere of responsibility. With respect to the unauthorized ride on the high-low vehicle, Kiplock said that since no ships were working, the employees were "involved in a Terminal operation " (A. 57). The housekeeping violation was allocated to the Terminal again because no ship was working and repairs were being made by Terminal at that time (A. 103). The violation for improper storage of flammable materials was assigned to the Terminal company since the cleaning and repair operations were being conducted by that corporation (A. 131). These criteria were employed by the compliance officer in deciding which employer to cite for which violations. Northeast Stevedoring was cited for several violations; then on May 14, 1974, a citation for seven

non-serious violations, [4] one of which was deemed to be a repeated infraction, [5] together with a notification of a proposed penalty in the amount of $620, was issued against the Northeast Marine Terminal Company. (A. 5-7).

3. Administrative proceedings.

Northeast Marine Terminal exercised its right to a hearing on the citations by filing a notice of contest on May 28, 1974, pursuant to 29 U.S.C. section 659 (a) & (c); (A. 8) the Secretary of Labor issued a formal complaint on June 12, 1974 and the company answered on June 26, 1974 (A. 9-20). The matter was assigned to Administrative Law Judge Joseph Chodes, who set a date and location for the hearing, (A. 21), and on July 22, 1974, the judge ordered the Secretary and Northeast to disclose

4/ 29 U.S.C. section 666(c) prescribes penalties for violations "...determined not to be of a serious nature...." Serious violations are defined in 29 U.S.C. section 666(j). Of the seven original violations, the Secretary seeks review of the order only with respect to three of them. The high-low violation was cited as contravening 29 CFR section 1910.178(m)(3) which provides:

> Unauthorized personnel shall not be permitted to ride on powered industrial trucks. A safe place to ride shall be provided where riding of trucks is authorized.

The accumulation of debris was cited as a violation of 29 CFR section 1910.22(a)(1) which reads:

> All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

And the storage of gasoline was cited as being in violation of 29 CFR section 1910.106(e)(2)(iv)(b) which provides:

> Where flammable or combustible liquids are used or handled, expect in closed containers, means shall be provided to dispose promptly and safely of leakage and spills.

5/ See 29 U.S.C. 666(a). A prior citation for unauthorized riding on a high-low vehicle formed the basis for the repeated violation (A. 59-60, 138-140, 144-45).

the identity of prospective witnesses, identify triable issues and explore stipulations of uncontested matters (A. 22-24). Counsel for Northeast Marine, who also represented Northeast Stevedoring with respect to its citation (A. 36), responded to those instructions by letter, listing several potential issues and identifying "P. Kiplock" as the safety director for Northeast Marine Terminal and its only witness (A. 25-27).

At the hearing, held on September 13, 1974, the Secretary called the compliance officer to the stand and he testified to the facts set out above. In particular he stated that he was assigned to inspect the Northeast complex (A. 42); that he had done so before and that Mr. Kiplock was familiar to him from these prior occasions (A. 134); that he spent two days touring the entire complex in the company of Mr. Kiplock (A. 50-51); that he was introduced to Mr. Magna, the Engineer of the Terminal Company (A. 49, 77-78); and that he was not previously aware that there were two separate corporations which occupied the site (A. 132). He described the various conditions he observed which formed the basis for the citations and he further testified that Kiplock took corrective measures for several of the conditions which were pointed out to be violations, (A. 58, 93, 99, 102, 107) as did Mr. Magna (A. 49-50, 76-79, 119-22); that at the closing conference Kiplock told him that he, Kiplock, represented both the Stevedoring company and the Terminal company (A. 113); and that Kiplock described the

differing functions of the two companies and that this description was used to allocate the violations between the two (A. 52-53). 6/

The compliance officer also testified that the high-low vehicle infraction was characterized as a repeat violation on the basis of a prior uncontested citation of the same employer for the same violation, (A. 59-60) and a copy of this citation was entered into evidence following a stipulation by the parties (A. 138-40, 144-45).

After the compliance officer stepped down, the Secretary of Labor rested its case, save for possible rebuttal (A. 140). At this point, Northeast Marine Terminal Company also rested, without having called a single witness (A. 140), and the hearing was concluded.

Following the submission of briefs by the parties, the judge issued his decision and order January 30, 1975, in which he vacated the citations (A. 155). While he decided that the violations had been proved, he found that the identity of the employer of the exposed employees had not been established

6/ Counsel for the employer frequently objected to this testimony (A. 41, 43-46, 55, 125, 133), asserting several times that the testimony as to what Kiplock and other employees said to the compliance officer was inadmissible hearsay (A. 47-49, 57, 92, 93, 107, 108). In each such instance the administrative law judge overruled the objection and admitted the testimony (A. 47-49 57, 92,93, 107, 108).

to be Northeast Marine Terminal Company; consequently in his view that company's liability had not been proven (A. 154-55).

The Secretary of Labor sucessfully petitioned for review before the full Commission with respect to three of the violations (A. 158). In addition, review was directed on the issue of what effect was to be given several recent courts of appeals and Commission decisions, including this Court's opinion in Brennan v. OSHRC and Underhill Const'n. Co., 513 F.2d 1032 (1975), on liability in situations where more than one employer occupies a worksite (A. 157). On August 31, 1976, the Commission affirmed, by a two to one vote, the judge's decision, and the Secretary then filed a petition to review this decision in this Court on October 21, 1976.

4. Disposition below.

From his examination of the record, the administrative law judge concluded that although Kiplock was employed as the safety director of Northeast Stevedoring, he had "some overall supervision of the worksite" and that he acted as representative for both companies at the closing conference (A. 150-52). The judge acknowledged that Mr. Magna was employed by the Northeast Marine Terminal and that he did correct certain of the cited violations (A. 152). However he found no evidence of the identity of the employer of the persons exposed to the hazardous conditions (A. 152), and he found the absence of such

evidence to be completely dispositive of the case, (A. 153) and vacated the citations (A. 155). The judge made no judgment on the credibility of the compliance officer's testimony; rather he merely noted that the compliance officer had not asked employees who their employer was and therefore was unable to testify on that subject (A. 152). For the administrative law judge, this deficiency was fatal, since he believed a citation could not be sustained without proof that the exposed persons were employees of the cited employer (A. 153).

The full Commission, in light of several intervening decisions of the Commission and the courts of appeals, 7/ broadened the scope of the relevant inquiry beyond whether the Secretary had shown that exposed employees were employed by Northeast Marine Terminal. Also to be considered was whether Northeast Marine Terminal had created or controlled the hazardous conditions no matter whose employees were exposed (A. 157 & n. 1). With regard to the theory of exposure of one's own employees, the Commission adopted the judge's conclusion that the Secretary had not established the identity of the employer of those employees who were exposed to the hazardous conditions (A. 160).

7/ Brennan v. OSHRC and Underhill Const'n. Co., 513 F.2d 1032 (C.A. 2, 1975); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255 (C.A. 4, 1974); Anning-Johnson Co., CCH 1975-76 OSHD ¶20,690 (OSHRC 1976); Grossman Steel & Aluminum Corp., CCH 1975-76 OSHD ¶20,691 (OSHRC 1976)

On the second theory of liability, the Commission majority wrote:

> Moreover, we cannot infer from the evidence that respondent created the noncompliant conditions or was responsible therefor. The inspector's only information regarding respondent's responsibilities was from Mr. Kiplock. That evidence is much too inconclusive and unreliable for us to conclude that respondent was the responsible employer. Mr. Kiplock simply outlined to the inspector the general functions of respondent and the general working area of respondent's employees. There was no direct evidence from which we can reasonably infer that respondent was the employer responsible for the alleged hazards involved in this case or who created them. The hearsay statements of Mr. Kiplock on the professed functions of respondent are inherently unreliable because his authority to represent respondent was not clearly shown. On the other hand, the Judge's distrust of Mr. Kiplock's allocation of the violations was justifiable since his authority to represent the Northeast Stevedoring Company has not been questioned.(A. 160-61).(emphasis in original)

The Commission arrived at this conclusion by ignoring the fact that Northeast Marine made no effort to rebut the testimony of the sole witness, the compliance officer, and the fact that Northeast Marine admitted, through its counsel, that Kiplock was its employee. Rather, the Commission made it clear that it would expect the compliance officer to conduct the two-day inspection again, presumably in the company of the employer's

representative, Mr. Kiplock. [8/] Accordingly, the Commission affirmed the judge's decison vacating the citations (A. 161).

Commissioner Cleary dissented, maintaining initially that there could be no disputing the facts that the cited standards did apply to the conditions found at the worksite, that those standards were violated and that somebody's employees were thereby exposed to the hazardous conditions (A. 162). Secondly, he pointed to the unrebutted testimony of the compliance officer and the letter from counsel for Northeast Marine admitting Kiplock's agency status and argued that they established that Kiplock was employed by Northeast Marine as safety director and thus fully qualified to represent that corporation at the closing conference (A. 163 & n. 10). Therefore his statements to the compliance officer were competent evidence and should have been given their natural probative force (A. 162-63 & nn. 10, 11).

8/ The Commission stated:

> Finally, we note our basic disapproval of the procedures followed by the inspector in this case. He should not have attempted to correct his mistake by simply dividing up the violations, especially since he was dependent solely on the judgment of Mr. Kiplock to do so. It would have been more equitable, and simpler in the long run, for him to have retraced his steps and determined for himself who was actually responsible for the conditions and whose employees were exposed to the resulting hazards. (A. 161)

In the view of Commissioner Cleary, these statements established that Northeast Marine Terminal had created or could control those hazardous conditions. 9/

9/ Commissioner Cleary noted that Kiplock told the compliance officer

> that Northeast Marine Terminal was responsible for providing and maintaining the roadway, work sheds, buildings, and equipment in the terminal. On the other hand, the safety director continued, Northeast Marine Stevedoring was responsible for loading and discharging vessels, storing and removing cargo from sheds, as well as loading and discharging trucks. (A. 163). (footnote omitted) (emphasis in original)

He further observed:

> In addition to these general descriptions, respondent's safety director assisted the CO in determining the responsibility under the Act for each noncomplying condition. Regarding both the powered industrial truck item [29 CFR section 1910.178(m)(3)] and the housekeeping item [29 CFR section 1910.22(a)(1)], the safety director noted that Northeast Marine Terminal (respondent) was the proper party to cite since no ships were "working" at the time. In other words, there was no loading or unloading being done - the function performed by Northeast Marine Stevedoring. As to the flammable liquid item, respondent's representative made it known that the gasoline was being used by Northeast Marine Terminal to clean equipment as part of its repair and maintenance function. (A. 164).(emphasis in original)

Alternatively, Kiplock's action in immediately correcting two of the cited conditions proved his employer's control (A. 164). Consequently, the dissenting commissioner would have affirmed the citations (A. 165).

The Secretary's petition to this Court to review the Commission's order followed.

ARGUMENT

THE COMMISSION ERRED IN FALLING TO FIND NORTHEAST MARINE TERMINAL COMPANY RESPONSIBLE FOR THE VIOLATIONS.

From the facts as set out above, it is clear that the only issue remaining in this case is whether the Secretary proved a prima facie case of control over the hazardous conditions by the Northeast Marine Terminal Company. The administrative law judge found that the hazardous conditions were violations of the cited standards and that employees on the worksite were exposed to the hazards (A. 151-53); these findings undisturbed by the full Commission, are supported by substantial evidence and thus are conclusive. 29 U.S.C. section 660(a). In these circumstances, the Secretary, in order to complete his case, need only have established that Northeast Marine Terminal created or controlled the violative conditions. Brennan v. OSHRC and Underhill Const'n. Co. 513 F.2d 1032, 1038 (C.A. 2, 1975); Anning-Johnson Co., CCH 1975-76 OSHD ¶ 20,690 (OSHRC 1976);

Grossman Steel & Aluminum Corp., CCH 1975-76 OSHD ¶ 20,691 (OSHRC 1976). The Commission held the evidence presented by the Secretary to be insufficient on this issue. That determination must be reversed since, as we demonstrate below, the Commission's decision is contrary to law, an abuse discretion and was arrived at in an irrational disregard of the record.

1. We note first that the question of the sufficiency of the evidence in administrative hearings is a question of law, Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 276-77 (1933); ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88, 92 (1913); Jaffe, Judicial Control of Administrative Action, 595 (1965), and that conclusions of insufficient evidence made by administrative agencies are, in appropriate circumstances, reversible by courts of appeals. American Rubber Products Corp. v. NLRB, 214 F.2d 47, 51-52 (C.A. 7, 1954). See International Union (UAW) v. NLRB, 459 F.2d 1329, 1337 & n. 44 (C.A.D.C. 1972). The Commission decision under review here is a case where reversal is required.

The principal reason for the Commision's conclusion is its complaint that there was no "...direct evidence from which we can infer that [Northeast Marine] was the employer responsible..." (A. 160-61); in the view of the majority, the recitation by the compliance officer of Kiplock's statements was hearsay and "...inherently unreliable because [Kiplock's] authority to represent [Northeast Marine] was not clearly shown" (A. 161).

However, this per se disregard of Kiplock's out-of-court statements as inherently unreliable is totally inconsistent with the unrebutted evidence.

The record shows that the worksite involved was permanently occupied by two different corporations with two different sets of functions and responsibilities; that the compliance officer had previously conducted inspections there and as a result knew Kiplock prior to this occasion; that he met with Kiplock for an hour before the inspection and there was no indication that there was more than one corporate employer on the site who might have a representative different from Kiplock; that Kiplock took the compliance officer on a two day tour of the worksite during which Kiplock's authority to order abatement of violations was exercised and not questioned, and finally that at the closing conference Kiplock told the compliance officer that he represented both employers.

It is true, of course, that in so far as the source of this evidence is the recitation by the compliance officer of what Kiplock told him, it may well be considered to be inadmissible hearsay under traditional tests unless Kiplock's representative status is established by evidence other than his out-of-court statements. However, this administrative proceeding was conducted without a jury, and it has long been a principle of the law of administrative evidence that hearsay is freely admissible and

can constitute substantial evidence to support findings. Richardson v. Perales, 402 U.S. 389, 402, 407-08 (1971) Opp Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941); NLRB v. International Union of Oper. Engrs., Local Union No. 12, 413 F.2d 705, 707 (C.A. 9, 1969); Rocker v. Celebrezze, 358 F.2d 119, 122 (C.A. 2, 1966); American Rubber Prods. Corp. v. NLRB, 214 F.2d 47, 52 (C.A. 7, 1954). While the evidence was admitted in this case, the Commissioners rejected it as being tainted since it was hearsay.

In the very recent case of Richardson v. Perales, supra, the Supreme Court held that in an administrative hearing on eligibility for disability benefits, medical reports of doctors who examined the claimants were admissible and could constitute substantial evidence even when contradicted by live testimony from other physicians and the claimant himself. The standard for determining substantial evidence was enunciated in that case as "...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 402 U.S. at 401, quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). If an administrator is permitted to rely on hearsay evidence which "...a reasonable mind might accept as adequate..." in the face of contradictory, live, non-hearsay testimony, it is clearly an abuse of his discretion to reject out of hand such hearsay evidence when the opposing party introduces no evidence whatsoever to contradict its probative force.

A reasonable person who knew that Kiplock was familiar to the inspector from previous inspections, that he accompanied the safety inspector throughout the site occupied by both corporations, exercised authority to order correction of violations, and supplied the Federal reporting numbers for both companies, would conclude that he was responsible for safety matters throughout the premises; and when the compliance officer, whose credibility has not been impugned, testifies that this same individual said at the closing conference that he represented both corporations, a reasonable mind can only conclude, in the complete absence of

any contraty evidence, that he possessed the authority to speak for the Northeast Marine Terminal Company.

Consequently, it was irrational for the Commission to fail to conclude that the Secretary had proved a prima facie case of liability. The failure to consider this clearly relevant and probative evidence was arbitrary and an abuse of discretion granted to the Commission; it must be corrected by this Court. 5 U.S.C. §706(2)(a); See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); International Union, (UAW) v. NLRB, 459 F.2d 1329, 1346 (C.A.D.C., 1972) (failure to apply adverse inference rule reversible error); Columbia Broadcasting System, Inc. v. F.C.C., 454 F.2d 1018(C.A.D.C., 1971). As this court has noted in the similar circumstance of an administrator's disregard of evidence of out-of-court statements, "...[c]onsidering the fact that [the declarant] was an active member of the group and semmingly their spokesman and that the group was then and there engaged in some sort of joint activity, it is difficult to see how this evidence could be properly rejected." N.L.R.B. v. Ford Radio & Mica Corp., 258 F.2d 457, 463 (C.A. 2, 1958).

2. To permit this holding to stand will seriously contravene one principal aim of the Act. This legislation was meant to provide swift and certain enforcement in order to deal effectively with the immense social problem posed by unsafe and unhealthy working conditions. The Secretary necessarily relies extensively on the admissions made by employees and employer representatives to the compliance officers who conduct the inspections, not only

in the internal administrative process but also to establish his case should the matter go to hearing. The instant case is a prime example. On construction sites with many employers performing different functions, the responsibilities of employers will be elicited by extensive questioning of employer representatives, and individual employees will be asked who their employer is. The responses are crucial links in the chain of liability and in the vast majority of the cases there can be no serious dispute as to the existence of the principal-agent relationship. Indeed, it is axiomatic that of the parties the employer, rather than the Secretary, has easier access to the ultimate proof should there be any serious doubt on this question. To burden the limited legal resources of the Secretary with the necessity for resorting to elaborate discovery mechanisms or calling potentially hostile witnesses merely to dispose of an issue which can have serious merit in only a small number of cases is unreasonable and antithetical to the cause of fair, efficient and expeditious enforcement of the Act. Rather, where the employer disputes the existence of the principal-agent relationship of those whose admissions are introduced by the compliance officer's testimony, it should bear the burden of producing the evidence to support its claim. That burden is simply met, and when the employer completely fails to discharge it; the issue should be concluded against it. In the context of the tremendous volume of citations under this Act, to place that burden on the Secretary is to permit the proceeding to deteriorate into a game, whose only losers will be the employees the Act was designed to protect. The Commission should not "...act as an

umpire blandly calling ball and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission." Brennan v. OSHRC & John J. Gordon Co., 492 F.2d 1027, 1032 (C.A. 2, 1974), quoting Scenic Hudson Preservation Conf. v. F.P.C. 354 F.2d 608, 620 (C.A. 2, 1965), cert. denied, 384 U.S. 941 (1966).

3. Indeed, the decision here should be reversed, since it is clear the Commission has in other cases effectively placed this burden on employers. Thus the instant case is glaringly inconsistent with the Commission's own decisions issued both before and after the order in this case. In Huber, Hunt, Nichols and Blount Bros., CCH 1976-77 OSHD ¶20,837 (OSHRC June 28, 1976), the Commission held that statements of a duly designated "walkaround" representative who assisted the employer in maintaining safe working conditions were not even hearsay. CCH 1976-77 OSHD at p. 25,012. Accord, A. J. McNulty & Co., Inc., CCH 1975-76 OSHD ¶20,600, n. 5 (OSHRC April 8, 1975); Stephenson Enterprises, Inc., CCH 1976-77 OSHD, ¶21, 120 at p. 25,428 (OSHRC Sept. 22, 1976)(evidence presented by these admissions completely unrebutted by the employer). It is axiomatic that such inconsistency by an administrative agency cannot be sustained without a rational explanation by the agency. Secretary of Agriculture v. United States, 347 U.S. 645, 653 (1954); International Union (UAW) v. NLRB, 459 F.2d 1329, 1341 (C.A.D.C. 1972).

4. Finally, we note that while the reasons advanced thus far require reversal, the record contains an additional element, totally ignored by the Commission, which places the resolution of this issue beyond doubt.

The response to the judge's instructions filed by counsel of record for Northeast Marine, in which Kiplock was identified as the safety director for that company, conclusively established that Kiplock had abundant authority to speak for Northeast Marine. It is beyond argument that Northeast Marine's attorney of record, representing it in this administrative proceeding, was acting with the full authority of his client when he made the admission of Kiplock's employment. This circumstance corresponds strictly to the well-developed evidentiary concept of judicial admissions in court litigation and is no less binding in the situation at bar. See Glick v. White Motor Co., 458 F.2d 1287, 1291 (C.A. 3, 1972); Frank F. Jelleff, Inc. v. Braden, 233 F.2d 671, 675 (C.A.D.C. 1956); McCormick, Handbook on the Law of Evidence, §265 (2d Ed. 1972); Note, Judicial Admissions, 64 Co. L. Rev. 1121 (1964). Thus, Kiplock's employment by Northeast Marine and his identification as safety director established his authority to speak for Northeast Marine at the closing conference and this authority was shown by evidence independent of the testimony of the compliance officer.

Given the conclusive proof of Kiplock's position in relation to Northeast Marine, all of his statements

testified to by the compliance officer no longer bear the stigma of unreliable hearsay; rather they are competent evidence, freely admissible even before a jury in a criminal prosecution and entitled to their natural probative weight. Rule 801(d)(2)(D), Fed. R. Evid.; McCormick, supra, §267.

That evidence clearly established that Northeast Marine either created or controlled the hazardous conditions within the meaning of this Court's decision in Brennan v. OSHRC and Underhill Const'n. Co., 513 F.2d 1032 (1975). The Commission thought it inconclusive because he"...simply outlined to the inspector the general functions of [Northeast Marine] and the general working areas of [its] employees" (A.160). However, the record amply demonstrates that Kiplock's information was sufficiently detailed. At the closing conference each violation was considered separately and Kiplock explained its relationship to the functions of Northeast Marine (A.53-54). Kiplock told the compliance officer that the employees riding the high-low vehicle were involved in a Terminal operation, since no ship was working, and hence they were under that corporation's control (A. 56-57). At the closing conference, Kiplock explained that the housekeeping violations occurred at a time when the Terminal company was conducting its repair operations (A.103). Lastly, with respect to the use of flammable liquids, Kiplock told the compliance officer that the Terminal company was cleaning the machine parts for use by the Stevedoring company (A. 130-31). Thus,

this record shows that Kiplock did more than "simply outline the general functions" of Northeast Marine; he supplied definite, detailed information, specifically related to each violation and hardly "inconclusive."

In this case it cannot be doubted that the statements of an employer's safety director, not refuted by any evidence, as to that employer's responsibilities with respect to hazardous conditions at a worksite, together with the fact that he acted immediately to correct those violations, established liability under the Act.

CONCLUSION

The Commission completely ignored the judicial admission of Kiplock's authority and egregiously erred in regarding his out-of-court statements as unreliable hearsay. The decision is based on a totally incorrect view of the law of evidence applicable to these proceedings, and for this reason it demands reversal.

For the above reasons the Commission's order should be set aside and an order entered holding Northeast Marine Terminal Company in violation of the three cited standards.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February 1977 copies of the above Brief and Joint Appendix were served by appropriate mailings, postage prepaid, upon the following counsel of record:

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